NOT FOR PUBLICATION — For upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

INEZ JAMES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. No. 2001-112**
	)	
GOVERNOR TURNBULL, in his official and individual capacity, GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Defendants.	)	

APPEARANCES:

Julie A. Beberman, Esq.
St. Croix, U.S.V.I.
For the plaintiff,

Kerry E. Drue, Esq.
Carol Thomas Jacobs, Esq.
Assistant Attorneys General
St. Thomas, U.S.V.I.
For the defendants.

MEMORANDUM

Moore, J.

Inez James, the plaintiff in the above-captioned action, has been employed for over twenty-five years by the Virgin Islands Department of Education. Since 1988, she has worked as a school hall monitor at St. Croix Central High School. Sometime in 1996, the plaintiff's mother, a long-time friend and supporter of then-Governor Roy L. Schneider, spoke with the governor about the possibility of creating a new position within the Department of Education, the "Supervisor of Monitors" position. The governor

created the position, and in October 1996, James elected to be placed in exempt service as Supervisor of Monitors with an annual salary of $34,000.

In October 1998, the plaintiff applied to have her position as Supervisor of Monitors classified pursuant to 3 V.I.C. § 498. She was instructed to fill out the job description form, which she did, and was advised that after she did so, her request would be evaluated to determine whether she could be classified pursuant to the statute. Before her request for classification could be acted on, however, the newly elected Governor Charles W. Turnbull approved the elimination of the exempt position of Supervisor of Monitors. James was returned to the position of school monitor, at a salary of approximately $27,000.

In her complaint filed June 20, 2001, the plaintiff alleges, *inter alia*, that Governor Turnbull and the Government of the Virgin Islands violated her First Amendment right to free association when it eliminated her position as Supervisor of Monitors.[1] According to the plaintiff, she was effectively "demoted" to her former position as school monitor because of her mother's political affiliation with former Governor Schneider. In addition to damages, she seeks an injunction restoring her to

[1] The plaintiff's First Amendment claim is brought pursuant to 42 U.S.C. §§ 1981 and 1983. The plaintiff also includes claims for violation of the Due Process Clause of the Fourteenth Amendment, breach of contract, and intentional infliction of emotional distress.

the position of Supervisor of Monitors with its commensurate salary and prestige.

On August 27, 2001, the Court heard oral argument on James's application for a preliminary injunction. At the hearing, the Court raised, *sua sponte*, the question whether the plaintiff had complied with the applicable statute of limitations for her federal claims, having noted that the complaint facially shows that it was filed more than two years beyond the date she received notice that her position would be eliminated. *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (where plaintiffs alleged termination for impermissible political reasons, limitations period began to run from the date the plaintiffs were notified by letter that their appointments would terminate). The Court allowed James an opportunity to brief the issue in writing, and the government has filed its reply. Having carefully considered the arguments presented and the applicable law, the Court will dismiss the complaint in its entirety.

In addition to expressing her general displeasure at the Court's having raised the limitations issue at the hearing, James asserts that the statute of limitations is not jurisdictional, but rather provides an affirmative defense subject to waiver and equitable tolling. Although the Court agrees with the plaintiff that the statute of limitations is an affirmative defense and not

jurisdictional in nature, it does not agree that the Court may not raise the issue *sua sponte*. It is well-settled that a court may raise itself the issue of the deficiency of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, so long as the plaintiff is afforded an opportunity to respond. *See Oatess v. Sobolevitch*, 914 F.2d 428, 430 n.5 (3d Cir. 1990); *Roman v. Jeffes*, 904 F.2d 192, 196 (3d Cir. 1990). While it is true that the language of Rule 8(b) indicates that a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) dismissal, "an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994); *see also ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1995) (stating that the court can dismiss under 12(b)(6) where an affirmative defense appears on the face of the complaint); *Continental Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (3d Cir. 1942); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 352-53 (1990)(referring to the statute of limitations as one of several "built-in" affirmative defenses and collecting cases). Thus, it is clear that the Court may raise *sua sponte* a deficiency in the complaint under Rule 12(b)(6), which necessarily includes raising the "built-in"

affirmative defense of the statute of limitations.[2]

The plaintiff's Verified Amended Complaint facially demonstrates that it was filed outside the applicable two-year statute of limitations for Counts I (First Amendment), II (Fourteenth Amendment), and IV (intentional infliction of emotional distress). Accordingly, those counts will be dismissed pursuant to Rule 12(b)(6). The remaining breach of contract claim will also be dismissed, since the Court declines to exercise its supplemental jurisdiction over this purely local cause of action. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). An appropriate order follows.

ENTERED this 18th day of September, 2001.

FOR THE COURT:

_____/S/_____
Thomas K. Moore
District Judge

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[2] I note that the defendants properly asserted in their original answer the defense of "failure to state a claim upon which relief can be granted." (*See* Answer ¶ 42.) As discussed above, the statute of limitations is a "built-in" affirmative defense subject to dismissal under Rule 12(b)(6) for failure to state a claim, thus, it could be said that the defendants properly asserted the defense in their answer. For this reason, striking the defendants' second answer, as the plaintiff urges, would not gain her any additional purchase.

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Kerry E. Drue, Esq.
St. Thomas, U.S.V.I.
For the defendants.

ORDER

For the reasons stated in the accompanying Memorandum of even date, it is hereby

ORDERED that the Verified Amended Complaint filed in the above-captioned matter is **DISMISSED**, and it is further

ORDERED that the plaintiff's motion for a preliminary injunction is **DENIED AS MOOT.**

ENTERED this 18th day of September, 2001.

FOR THE COURT:

_____/S/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

Copies to:

Honorable Jeffrey L. Resnick
Honorable Geoffrey W. Barnard
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